Commission of Inquiry
into
Residential Tenancies

Security of Tenure

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Research Study No. 11

SECURITY OF TENURE

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INTRODUCTION

The purpose of this paper is to examine security of tenure and to evaluate rent regulation as a means of providing security of tenure. In doing that, the paper will consider the relationship between security of tenure and rent regulation, and methods of providing security of tenure will be considered. It is clear that security of tenure and rent regulation are (at least in a limited way) inseparable because security of tenure would not be possible without at least some rent regulation; otherwise rents could simply be raised in order to bring about the de facto termination of a tenancy. However, it is also clear that rent control in the sense of a governmental determination of rents is not necessary for security of tenure. To what extent rents should be regulated depends partly, as it will be seen, on the purposes of security of tenure and on the reasonable expectations and reliance of landlords and tenants.

This paper points out that security of tenure may be implemented for different purposes. It may be used to deal with the economic problem of unaffordable housing -- either short-term or chronic. In this situation the tenant, either because of a temporary housing or income shortage or because of longer-term financial problems, cannot afford to rent

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accommodation. Security of tenure, in such a situation, is a social welfare measure, which, when coupled with rent control, shelters tenants from economic difficulties. However, security of tenure may also be viewed as a measure designed only to protect the psychological interest of the tenant and thus one that is meant, not to protect tenants from economic problems, but to ensure that the tenant has security of tenure similar to that of a purchaser of a home. In such a case the purpose of security of tenure is much more limited and involves rent control only to the extent necessary to prevent arbitrary rent increases that do not reflect the market or that are intended, for arbitrary reasons, to cause the tenant to move.

Thus, it will be seen that the elements of a security of tenure regime based on the rationale of protecting the psychological interest of tenants are somewhat different from those of a regime designed to protect tenants from affordability problems. Under both rationales, however, provision must be made to enable landlords to regain their premises for their personal use or for redevelopment, to protect the quiet enjoyment of the premises of other tenants, to deal with damage by tenants beyond regular wear and tear and to prevent tenants from wilfully misrepresenting the premises to prospective purchasers. The details of this protection will vary according to the rationale served. Both types of security of tenure are possible, however, and legal structures and rules can provide for either.

THE RATIONALE FOR SECURITY OF TENURE

It was in 1970 that Ontario legislation, with amendments to the Landlord and Tenant Act,[1] first dealt specially with residential tenancies. Moreover, it was at that time that the legal doctrine of the residential landlord and tenant relationship was substantially altered.[2] At common law, a lease did not create a contract per se. Rather, it created an estate in land, which remained vested in the tenant; that is, he or she retained the legal interest even if the buildings were totally destroyed.[3] The lease did not cease merely because the performance of one or more contractual obligations became burdensome or impossible. As a result, a tenant had to continue paying rent on a house that was completely destroyed. The tenant also had to continue paying rent even if the landlord did not maintain the premises in a fit condition. Unlike a contract, the terms of the lease were independent, so that the breach of the terms by the landlord did not relieve the tenant of this obligation to pay rent.[4]

The main effect of the 1970 amendments to the Landlord and Tenant Act was to bring about a revolution in residential landlord and tenant law that has taken place in other jurisdictions as well. There was a change from a property relationship on the part of the tenant to one closer to a contract between the landlord and tenant, but with the added benefit to tenants that the provisions of the Act could not be waived (see s. 82(1)). The amendments not only

introduced contract principles into residential tenancy relationships, but imposed a duty on the landlord to repair and maintain all rented premises (s. 96(1)); abolished security deposits for damages (s. 84(1)) while permitting a deposit for the last month's rent (s. 84); required the delivery of a copy of the tenancy agreement (s. 83); abolished seizure of a tenant's goods (s. 86); prohibited landlords or tenants from changing locks during occupancy without mutual consent (s. 95); granted some protection from retaliatory eviction;[5] and provided that a landlord could regain possession and evict only under court orders (s. 113).

These amendments did not in themselves create security of tenure, but they supplied the framework for it and helped create a rationale for it. It can be argued that by moving the landlord and tenant relationship from its feudal origins and its preoccupation with proprietary interest to a modern basis in contract law, the legislation set the basis for a new security of tenure regime.[6]

Even before overt security of tenure legislation tied to rent control was introduced, the Landlord and Tenant Act prohibited the granting of a writ of possession to a landlord if a reason for the landlord's application was a complaint by the tenant that the landlord had violated a provincial statute or municipal by-law dealing with health or safety standards, or more generally, an attempt by the tenant to enforce his or her legal rights. Quite clearly, security of tenure was granted in those circumstances in

order to enforce the new rights contained in Part IV of the Act (s. 121(3)(b) and (c)). In fact, the Act forbids the issuance of an order for possession where the landlord is in breach of his duties under the Act or of a material covenant in the lease (s. 121(3)(a)).[7]

In modern contract law, it has been argued, liability is based on principles of reasonable reliance and reasonable expectations.[8] The view holds that liability ought to be imposed on a person who ought reasonably to appreciate that others look to him literally or figuratively for protection of their interests. The importance of reliance and reasonable expectations is pervasive in law.[9] Lon Fuller has noted that the duty not to disappoint reasonable reliance and expectations lies at the very heart of law itself: general directive arrangements presuppose and intend that "sujects" should govern themselves as directed and require respect for conduct of the "subjects" that accords with the rules established to guide or direct them.[10] This general reciprocity in the legal system and this reference to reasonable reliance and expectation may be seen as the basis for the amendments in 1970. The reasonable expectations of most people in society were not being met in the laws dealing with landlord and tenant relationships under a feudal regime.[11] The law did not come close to meeting the social view of fairness and what residential tenants should reasonably be able to rely on and expect in their relationships with their landlords.

Viewed in this way, the amendments can be seen not as a revolution but rather as the law catching up to society's view of fairness and reasonableness in the relationship. The amendments were an attempt, in short, to alter the landlord and tenant relationship so that it would reflect society's view of a reasonable relationship between landlords and tenants.

It is correct to suggest, as did a report by the Ontario Ministry of Municipal Affairs and Housing, that the revisions in the 1970 Act "involved a substantial transfer of property rights from landlords to tenants";[12] but that statement presupposes a proper legal allocation of rights between landlords and tenants rather than a socially achieved consensus of what those rights should be. It is therefore difficult to answer any question that asks to what extent the property rights of landlords should be limited in a legal sense. There is no real limit that the law can impose. It is a matter of social values and beliefs. This is particularly the case in Canada, where the Charter of Rights and Freedoms[13] does not include protection of property rights and therefore a conclusion suggested in the dissenting opinion of Mr. Justice Tauro in the case of Mayo v. Boston Control Administrator[14] that the controls on a landlord that "operate to deprive the landlord of any alternative use of his property for an indefinite period of time ... constitute a taking" is not one that can easily be followed in Canada. (A taking is the seizing of property by the state without just compensation.)

In summary, it can be argued initially that security of tenure in Ontario is a function of social values and that it ought to reflect the reasonable expectations that society views as imperative in the landlord and tenant relationship. The reforms that were introduced in 1970 are a reflection of social values and those reasonable expectations and reliances.

It is clear, then, that security of tenure is not a legal problem in the sense that the law can give definite answers to the questions of security of tenure. The suggestion in the report by the Ministry of Municipal Affairs and Housing that "disputes over the proper definition of property rights lie at the very core of the debate over security of tenure in rent review" (p. 145) is incorrect to the extent that it suggests there is a legal rationale for security of tenure. In large measure, the legal system is able to reflect social values fairly easily with respect to security of tenure. The difficulty is in determining what those values are.

There are a number of ways to ascertain society's beliefs about security of tenure. For example, polling may be a mechanism for sorting out views if one can assume that the public understands the issues fully and that there are no self-serving votes.[15] More useful perhaps, is the suggestion made earlier that the values found in the legal system must reflect reasonable expectations and reliance. This is to suggest once again that, although society's desires are important, there are reasonable limits to those

desires. The question then turns to one of balancing the interests of landlords and tenants and of deciding who bears the cost of limitation.

There is a great deal of literature that suggests that modern social values have moved increasingly towards an acceptance of security of employment, housing, and government largess as family ties have become more attenuated.[16] Furthermore, one author believes that private and public relationships are merging as the state, through courts and administrative bureaucracies, regulates and controls more and more of the individual's life.[17] Such a view supports the notion that freedom of contract is no longer the norm and that society can and should impose social values in landlord and tenant relationships as it does in consumer affairs and other contractual tortious relationships based on reasonable reliance and expectation.

What then should be considered as reasonable expectations and reliance in the landlord and tenant relationship? This is not an easy question to answer. Cheung, in his article "A Theory of Price Control",[18] suggests that from an economic perspective an owner must have three sets of rights to assert that his property is "private property":

> Exclusive right to use or decide how to use the asset; exclusive right to receive income generated from the use of the goods; the right to transfer or freely alienate its ownership to any individual the owner see fit ... [including the right both to enter into contracts with other individuals and to chose the form of such contracts]. (p. 57)

Security of tenure violates Cheung's first and third necessary conditions for private property. More important, however, is the fact that private property as defined by Cheung virtually does not exist. Most contractual relations, as has been indicated, are regulated. Moreover, virtually all real property is subject to zoning, planning, demolition, and conversion controls,[19] which can substantially affect income, use, and alienation.

Society's reasonable reliances and expectations go far beyond an expectation and reliance on mere private property. Tony Honoré in The Quest for Security: Employees, Tenants, Wives[20] suggests three rationales for security of tenure that are divorced from the concept of private property and that relate to what reasonable expectations the members of society who are tenants might have about security of tenure. The first rationale is the purely economic interest of tenants who, in a free housing market, are capable of renting what they need, provided that the market operates normally. However, the market may be distorted and not operate normally. For example, in wartime tenants may need protection from landlords who, as a result of the war, are in a quasi-monopolistic position and can exploit a housing shortage. In such a situation, rent control is not enough. If rents are controlled, a landlord is free to give a tenant notice and ultimately evict him, to exact more than the controlled rent, and to prevent the tenant from taking legal action against him. Landlords may also see an advantage in selling their rental properties to owner-occupiers in order

to get a better return on their capital. During a housing shortage, therefore, tenants of this sort need security of tenure. Once the shortage ends, it can be argued that they no longer, by definition, need this sort of protection. In a free and efficient market, they can fend for themselves.[21]

A second rationale applies to tenants who are chronically uncompetitive. These tenants differ from the ones just described for they cannot generally pay for housing suited to their needs even in a free and efficient market. They need help through subsidies or special housing schemes, in short, by social services. If, by chance, they find suitable rental accommodation within their means, they need to be protected against increases that would put their current dwelling out of their reach; it is argued, therefore, that such tenants need protection against economic eviction that would put them in a position where they could afford no suitable substitute housing.[22]

In those two situations, the rationale for security of tenure is primarily economic. The problems are affordability problems, one temporary, the other chronic. By definition, the economic interest of tenants can be satisfied by suitable alternative accommodation -- suitable from the point of view of rent, quality, and accessability to work, play, and school. But there is a third rationale, which Honoré called psychological.[23] Many tenants become attached to their home, even if it is rented from someone else and do not want to move into economically equivalent

housing even if it is provided. These tenants have a primary interest in security of tenure. Affordability, to be sure, is of some import because if rents rise too high they will have to move, but in a properly operating market this fear is diminished.

Obviously, the three rationales overlap. A psychological interest has an economic component, and clearly the psychological interest itself can be seen to be of "economic value". It is important to note, however, that there can be three rationales for security of tenure, reflecting three different expectations. Security of tenure can try to protect those who are threatened in a temporary housing shortage until the market operates normally again; it can aim to protect the economically weak; and lastly, it can try to give those who cannot afford to buy their houses a substitute for homeownership -- a right to remain an occupant.

The legislation in Ontario can be seen as an attempt to meet all three goals. Rent control and security of tenure provisions can be seen as a response to severe market distortions arising from the crisis of the inflationary spiral of the 1970's. They can also be seen as a response to the winding down of many public-housing schemes and to limits on the direct subsidies for housing.[24] Finally, they can be seen as a response to a psychological interest in security, which has come to play a greater role in a modern society.[25]

It can be argued that the first two rationales are no longer acceptable. Clearly the need to respond to the

inflationary problems of the 1970's in such a drastic way has passed, although this is not to say that rents would not rise if rent controls were removed immediately.[26] Secondly, lower-income groups, it could be argued, should be subsidized by governments through tax revenues rather than by landlords through rent controls and security of tenure.[27] Finally, it is clear that there is a widespread feeling that tenants should have the same security as home-owners and that they should not be able to be forced out of their homes. It is important to note, however, that because rent control is still in effect in Ontario, security of tenure is necessary in order to prevent landlords from circumventing the rent control regulations.[28] Nevertheless, in the absence of rent control in Ontario, there would still be a rationale for security of tenure -- namely, to protect the psychological interest of tenants. It can be argued that it has now become a reasonable expectation for tenants that, provided they do not break their lease or other agreement, they can reside in their dwellings in the same way that home-owners can. Moreover, tenants, it can be argued, can reasonably rely on that security in a society where landlords no longer have an absolute discretion to control residential property and where the tenant's security can now only be limited by reasoned action.[29]

THE BASIC ELEMENTS OF SECURITY OF TENURE

We have suggested that there is a rationale for security of tenure that is different from the need to overcome short-

term housing shortages and the need to protect the economically weak and that extends to the need to protect a psychological interest in residential occupation. It is necessary to examine the elements of that security based on this latter rationale. If the goal of security of tenure is to provide the same security that home-ownership brings, it is perhaps best to begin with the comparison to home-ownership. It is clear that in homeownership, security of tenure is in no way absolute. It is limited by the costs that the home-owner must bear directly and for which the tenant in general is not directly responsible, such as taxes and mortgage payments. If owners fail to pay either of those costs (not to mention utility and heating costs), they may lose their property. The Municipal Act[30] provides, for example, for the sale of property for the non-payment of municipal taxes, and mortgages in Ontario provides that the mortgagor can repossess property in a number of ways for failure to pay the mortgage.[31] In theory, the mortgagee has very broad control over the use of the property and can resume possession of it if the mortgagor in any way breaches the mortgage, such as by making alterations without the permission of the mortgagee or failing to insure the property adequately.

It is clear, however, that even though technically the mortgagee is insecure even if the mortgage is paid, in reality he or she is considered to be secure as long as the mortgage is paid and this is generally de facto the case.

This means that the mortgagee will not be dispossessed unless the mortgage or the taxes are not paid. To grant the same protection to tenants would mean that they should not be able to be dispossessed as long as they pay the rent. To fulfill the psychological rationale stated above, therefore, security of tenure should have as one of its elements the right to remain in possession of the rented premises as long as the rent is paid. That is not to say that limits cannot be placed upon security of tenure for certain purposes, such as to protect other tenants, but it does mean that security of tenure serving the psychological goal outlined above should include a general, although not unlimited, right to occupation where the rent is paid.

A major difference between security of occupation in a tenancy and in home-ownership is that the initial cost, or purchase price, is set in the case of home-ownership but not in the rental situation. Once the buyer and seller have entered into an agreement regarding price, that agreement cannot be changed, although the interest rate on the mortgage may vary and thus the real price (purchase price and interest) of the property may change. The quantity and frequency of change depend on the changes in interest rates and the length of the mortgage. Given that the Interest Act[32] in Canada effectively precludes mortgages of longer than five years' duration, the real price of ownership cannot be set for more than five years.[33] Given the volatility of the mortgage market in recent years and the move to variable mortgage rates, there can be and have been

dramatic changes in interest rates in the space of as little as one or two months. Even with set mortgage rates, terms of six months have become common. Perhaps most importantly, however, the initial purchase price for the premises does not change and there is an effective market for mortgage funds so that the mortgagee cannot force higher rates upon the mortgagor and the mortgagor can seek out other funds without giving up the premises and going to the expense of moving. The payment of funds equal to the outstanding amount borrowed when the mortgage comes due effectively protects the mortgagor from the power of the mortgagee.

In the absence of rent control, a tenant is in a substantially different situation. The tenant cannot limit his or her debt to the landlord by agreeing to a purchase price. The landlord, moreover, has an inordinate market power over the tenant because the tenant cannot simply seek other funds to pay off a predetermined and agreed to amount to the landlord. In the absence of rent control the landlord can raise the rent and force the tenant to pay or vacate the premises. This problem is compounded by the fact that the landlord, in the absence of rent control, may treat tenants of similar premises differently and thus charge different rents to different tenants who rent similar properties. A further real difference between tenants and purchasers is that, in the present market, residential landlords will not give long-term leases: that is, it is not generally possible to contract for security of tenure

because residential landlords, on account of rent control, do not usually give leases for more than one year.

The last point highlights the difference between a fixed-term lease and the security of tenure to which "statutory" tenants are entitled. A tenant under a lease need not concern himself or herself with any of the statutory limitations on security of tenure that are discussed below. His or her protection comes from the lease term itself and the inability of the landlord to evict without a court order (see s. 114 of the Landlord and Tenant Act). On the expiry of the lease (assuming a new agreement is not entered into), the tenant, subject to the landlord's need for possession under s. 105 or s. 107, is deemed to be a monthly tenant, under s. 106(1), on the same terms and conditions as in the expired lease.[34] However, the tenant is now a statutory tenant. His or her status now depends on the Act, and he or she is subject to the limitations on security placed on a monthly tenant. Of course, even tenants with fixed-term leases may have their lease terminated under s. 108 for non-payment of rent[35] or under s. 109 for malconduct.[36]

A tenant without security of tenure is in a position that is not dissimilar to a mortgagor whose mortgagee charges different mortgagors different rates of interest and different initial purchase prices for similar properties. But as has been pointed out, the mortgagor can seek funds elsewhere and avoid the problem of the mortgagee's imposing higher rates without moving. Moreover, the initial purchase

price is agreed to before the purchaser moves into the property and therefore does not cause difficulties, assuming there is a properly functioning market for housing.

Having suggested that the landlord has broader powers than a mortgagee, particularly because of the cost and inconvenience to the tenant of moving, it is important to point out that this is in part the difference between renting and owning. One would expect market prices to reflect the difference in costs between the two different forms of security of tenure, and in one clear way they do. Since there is no capital sum to pay and no down payment, renting can be seen as a less expensive method of acquiring premises than purchasing, assuming the market is functioning properly. In turn, it is ultimately less secure, because in renting, the property is never paid for and thus it is always possible to lose it for failing to pay rent. (See s. 108 of the Landlord and Tenant Act.)

The question then becomes how to provide security of tenure that is comparable to that of ownership without substantially increasing the cost of rental accommodation to those who do not want or seek such tenure or substantially increasing the costs to landlords.

There seem to be several aspects to the security of tenure that is similar to ownership. As has been mentioned, there is the basic provision that tenants' tenure should be secure as long as they pay the rent. Such a provision should not affect the cost of the accommodation because it

is in the landlord's interest to have the rent paid. This does not cause problems and it is clearly comparable to security of tenure in an ownership situation where mortgage and taxes must be paid. A problem does arise, however, with respect to how meaningful security of tenure is when a landlord attempts to bring about an economic eviction by raising the rent for one or a few tenants to a higher level than normal market rents. A landlord might do this for a number of reasons: for example, he might dislike the tenant; or the tenant might be able to afford a higher rent; or the tenant might have damaged the premises. It seems that, if security of tenure is going to be conditional upon the payment of rent, there must be further protection to prevent such "discriminatory" rent increases, which would obviously defeat the purpose of security of tenure provisions based on the payment of rent. Such increases would not occur in ownership because the rate on a mortgage and the purchase price are set in advance. Moreover, if a mortgage term ends and the mortgagee attempts to discriminate in the setting of the rate, the mortgagor can go to the market to find money at a market rate without giving up the premises. Since a tenant cannot go to the market without moving from the premises, the ability of landlords to discriminate with respect to rates should be curtailed in order to give tenants the same protection as owners. Legislation providing security of tenure should, therefore, specify that landlords cannot raise the rents of one of their tenants in occupation at a rate different from that of

other tenants. That would mean that landlords with two or more tenants would have to raise all the tenants' rent uniformly. Such a provision would not provide rent control, since the landlord would be able to raise rents as he or she saw fit. It would merely limit a landlord's ability to discriminate among tenants in occupation. It would not prohibit landlords from changing rents on an individual basis in vacant tenancies, and it would not necessitate the need for review by an agency on a case-by-case basis to ensure that the rental increase was "discriminatory", that is, higher than normal market increases.

Such a provision, it can be argued, would substantially limit the ability of landlords with two or more tenants to discriminate, but would not prevent the landlord of a single units from discriminating, for the landlord could raise the rent for the one unit in order to force the tenant out. It can be argued that such an omission is a serious one because landlords who are renting only one or a small number of units are likely to be non-commercial landlords owning houses where the ability to discriminate may be important to them. This problem could be resolved in the following way. The Landlord and Tenant Act could prohibit discriminatory rent increases, that is, rent increases that have the sole purpose of encouraging the tenant to move[37] and which therefore are not normal market increases. It would then be necessary to set up a review agency (a court or administrative tribunal), but such an agency would deal only with tenancies involving one or a small number of units. There

would of course be evidentiary problems in proving the purpose of the rent increase, but given the rationale for security of tenure and the burden on the tenant in taking the matter before the tribunal, it would seem fair that the onus of proof that a rent increase was not discriminatory should be on the landlord.[38] Moreover, tenants should be able to use evidence of rents charged for similar units by other landlords where a single landlord has only a small number of dissimilar units. Ultimately the inquiry will be a factual one that seeks an answer to whether the landlord increased the rent only for the purposes of encouraging the tenant to move.

In summary, it can be seen that security of tenure in the absence of rent control contains at least two main elements. One is the right to occupation as long as the rent is paid in accordance with the terms of the lease, and the second is a restriction on "discriminatory" rent increases, that is, increases that are higher than normal market increases in order to encourage the tenant to leave the premises through a requirement that landlords raise their rents uniformly and that a single tenant or small numbers of tenants be given legislative protection from discriminatory rent increases. Such an approach would provide sufficient rent regulation to give tenants a security of tenure similar to that of home-owners and would minimize the need for enforcement.

A third element that should be considered is the duration of security of tenure. It has been assumed thus

far that security of tenure applies only to the tenant in occupation. This is the situation in British Columbia under the Residential Tenancy Act (B.C.). In both the United Kingdom[39] and in Hong Kong,[40] however, there is a provision for security of tenure to extend beyond a tenant in occupation. In private tenancies in the United Kingdom, there may be two successors to the original tenant; thus if the original tenant was a married man, his widow may succeed to his tenancy and another member of his family to her in turn. In Hong Kong and in private tenancies in the United Kingdom, there can be only one transmission of the secured tenancies within the circle of spouse and resident members of the original tenant's family. If one is looking to the reasonable limitations on the ability of landlords to control the use of property and a desire to have tenants treated reasonably in a way similar to owners, then such provisions would seem to be suitable and in keeping with the protection of the psychological interest of the tenant. There is some protection of the security of tenure for the family of the tenant, which can be viewed as psychologically important, and yet it is not unlimited. Moreover, it would not include the ability of the tenant to grant security of tenure to an assignee without the landlord's permission. Such a right, it can be argued, does not come within the psychological interest of the tenant described earlier.

In Ontario, the Divisional Court, in Lifshitz v. Forest Square Apartments Ltd.,[41] has dealt with this problem under the present Act. In that case, the tenants wished, on the

expiry of a one-year lease, to vacate their apartment and assign the lease to another party. The landlord refused its consent to the assignment. The County Court under s. 91(5) of the Landlord and Tenant Act permitted the assignment and the landlord appealed. The tenants argued that, under s. 106(1) of the Act, they were deemed to be monthly tenants on the same terms as provided for in the expired lease, including, through s. 91(3), the right to assign.[42] The tenants' argument that the Act allowed tenants to pass their security of tenure on to an assignee was rejected by the Divisional Court. The Court held that a statutory tenant under s. 106(1) (that is, a tenant whose right to possession depends not on an explicit tenancy agreement but on the Act) has a personal right to possession with security of tenure but does not have the legal ability to pass this security on to a third party without the agreement of the landlord.

This result is consistent with the principle of security of tenure. That principle is not meant to give tenants the ability to control property belonging to the landlord for the purpose of making market transactions. It is meant to sustain tenants' ability to secure possession for themselves and their family. Thus such an approach removes the incentive for tenants to charge "key money" to sub-tenants where rents are controlled and below market levels. A restriction of security of tenure to family members accomplishes the same result.

It is clear then that the third and final element to be considered in security of tenure is the duration of the

tenancy, and it is also clear that a number of options are available with respect to that term. It can be limited to the tenant in occupation or extended to those relatives living with him or her. It does not seem necessary, however, pursuant to the psychological rationale for security of tenure, to give tenants the right to grant subleases.

LIMITS ON SECURITY OF TENURE

This section discusses the limits on security of tenure separately, although the ideas behind such limits were mentioned in the above examination of the elements of security of tenure. There are limits in the requirement that the tenant pay rent, in the restrictions on discriminatory rent increases, and finally in the provision that security of tenure is of limited duration. There are, however, other limits that should be discussed and which go beyond the basic elements of security of tenure. Those limits pertain to the needs and expectations of the landlord and other tenants.[43]

Conduct of Tenant

It is possible that the conduct of a tenant or persons that he or she allows on the premises may disturb the quiet enjoyment or safety of the other tenants or the landlord. In such circumstances the landlord should be able to seek approval from a legal body to terminate the offending

tenant's security of tenure.[44] Such a provision is necessry to protect the interest of the landlord and other tenants. Indeed, it can be argued that the present legislation, that is, s. 109(1)(c) and (d) of the Landlord and Tenant Act, misses the mark in limiting the ability to apply for the termination of a tenancy to the landlord alone. In circumstances where a tenant is substantially interfering with the reasonable enjoyment of other tenants or is endangering their safety or other interests, there seems to be a clash between the real security rights of two groups of tenants. In order to safeguard the interests of the innocent tenant, the Act should be amended to allow that tenant to bring a termination application against the wrongdoer. Innocent tenants cannot always count on the landlord's invocation of s. 109(1) of the Act. There may be times when an innocent tenant is forced out by the actions of another tenant that the landlord actually encourages or is unwilling to challenge. Some think that it is unwise to put in place a legal mechanism which allows tenants to litigate among themselves, rather than keeping the responsibility for the maintenance of appropriate conduct on the landlord. Clearly, tenants would try, as a preferred option, to ensure that the landlord did carry out his or her duties, but in the last resort, the general rationale for security of tenure as outlined above is consistent only with an ability in a law-abiding tenant to enforce the provisions of the Act where his or her security is at stake.[45]

Damage by the Tenant

A second restriction on security of tenure can be seen in the need to protect the landlord's investment. If the tenant damages the premises beyond reasonable wear and tear, the landlord should have an opportunity to recover the cost of the damages or to require the tenant to leave in the event that damages are not paid. Such a provision is akin to provisions in the mortgage agreement for possession where the mortgagor has damaged the property. A provision for the payment of a monetary sum for damages, of course, provides for greater security of tenure because the damage itself cannot result in the loss of the premises. Some mechanism is needed in order to ascertain whether damage beyond reasonable wear and tear has occurred. It may be that the tenant should be able to choose between periodic inspection by the landlord and a security deposit. It should be noted that s. 84 of the Landlord and Tenant Act forbids security deposits relating to potential damage to the premises,[46] and s. 93 seems to prevent the landlord, except in emergencies, from entering the premises without the consent of the tenant.[47] Section 93 requires a written notice of twenty-four hours before a landlord's right to enter may be exercised, but the Act is not clear as to what rights to enter the landlord has in the first place. It has been argued that s. 92 allows the landlord to enter without notice in emergencies only when the lease gives the landlord a right of entry. If the landlord has no right to enter

under the lease, he or she would be a trespasser even if there was an emergency. Consideration should be given to amending the sections mentioned to make them consistent with both the tenant's security of tenure and the landlord's interest (on his or her behalf and on behalf of other tenants) in maintaining the premises in a good state of repair under s. 96(1) of the Act. It can be argued that security of tenure will result in less damage to premises as tenants will be living with the damage for a long period of time.

Misrepresentation to a Buyer

The British Columbia Law Reform Commission has suggested that if a tenant deliberately misrepresents the premises to a buyer, the tenant's security of tenure should be terminated.[48] It is clear that such a provision is a valid attempt to protect the interest of the landlord in selling the premises. There is no particular reason to protect a tenant who engages in any act destructive of the landlord's economic interest.[49]

Children

The problem of leases that prohibit children from living on premises is a difficult one. Attempts to deal with discrimination against families with children in the renting of an apartment have generally failed.[50] The real difficulty is to balance the interests of those such as elderly or single people who wish to be away from families with children

against the need for families to be able to find housing. It is clear that in an ownership situation a vendor can choose to sell to a family, and thus subdividers and developers may encourage families with children to live in certain parts of a subdivision. It is also clear that restrictive convenants limiting the use of land to families without children would be unlikely to run with the land as they would relate to the user and not the uses of the property.[51] It can be argued that a similar situation should exist with respect to rental accommodation. That is, to the extent that landlords are allowed under legislation to discriminate against people with children in the renting of premises, they may do so. But once a tenant has rented premises and has security of tenure, it should not be revoked because children are on the premises. If the tenants' children interfere with the quiet enjoyment of others, damage property, or put others in danger, then security of tenure could be terminated for those causes suggested above.

Landlord's Need for Possession

Under current legislation in Ontario, the landlord can terminate a periodic tenancy or obtain possession at the end of a fixed-term tenancy if he or she has a *bona fide* need for the premises for him- or herself or his or her immediate family.[52] This provision was recommended by the British Columbia Law Reform Commission[53] and can be considered

necessary to encourage owners to rent premises for which they have no immediate need. If the owner of a house could not reclaim the premises (on giving an appropriate notice), there would surely be a serious disincentive to rent. The ability of landlords to terminate a tenancy for the purpose of living on the premises themselves cannot really be squared with the rationale for security of tenure based on the tenants' social or psychological needs. But a choice must be made between the owner and the tenant as to who is to have the use of the owner's residential property. Because the owners of residential premises need to be encouraged to let their properties, s. 105 of the Act can be seen as a reasonable limitation on tenants' security of tenure.[54]

Redevelopment

Several jurisdictions have special provisions enabling landlords to obtain possession of premises for the purposes of redevelopment.[55] In Canada, the problem has been partially addressed by controlling the conversions of rental units to condominiums.[56] There have also been attempts in the United States to control the demolition of buildings so as to secure the tenure of tenants.[57] It appears that the problem of redevelopment would not be nearly as severe when there is not rent control as when there is rent control. Security of tenure will not be as threatened by reconstruction in the absence of rent control as where rent control exists because there will not be the need to use

reconstruction to circumvent rent control. There are a number of ways in which redevelopment could affect security of tenure. The British Columbia Law Reform Commission's report suggests that redevelopment is just cause for terminating security of tenure.[58] On the other hand, it could be argued that the landlord should be obliged in such cases to reimburse the tenant for the cost of moving, or at least to show that other similar or suitable accommodation is available to the tenant; price would not be considered, as the purpose of security of tenure is psychological and does not involve affordability per se. The cost of the former requirement would either be borne by all tenants in the rent they pay or by the landlord on the preceeds from the sale of the property, depending on market conditions. A requirement stipulating that alternative accommodation be available can be a rather meaningless test. Given that in the absence of rent control, redevelopment is probably going to occur in response to market pressure beyond the landlord's desire to increase rents, redevelopment, it could be argued, probably can be seen as just cause for terminating security of tenure, even though it clearly interferes with the psychological interest of the tenant.

In Ontario, s. 107 of the Landlord and Tenant Act allows the landlord to obtain possession in order to demolish the premises or to make repairs that are extensive enough to require a building permit and vacant possession, or to convert the premises from rental residential to some other

purpose.[59] The notice required for termination is at least 120 days.[60] This, as with s. 105 of the Act discussed above, is a situation where a choice must be made between security of tenure and the reasonable expectations of the owner. This choice, it seems, should be made in favour of the owner for a number of reasons. It is better to have the premises on the rental market until they are redeveloped than to induce the owner not to put them on the market or to charge more for them out of fear that a tenant's security of tenure will prevent redevelopment. Moreover, if the landlord can terminate individual tenancies because he or she wishes to redevelop the property, there is no need to be concerned about tenants achieving a consensus or agreement among themselves before such action can be taken. Finally, such an approach, while allowing for the protection of the legitimate psychological interest of tenants, inhibits the use of security of tenure as simply a device for preventing change and maintaining the status quo.

SECURITY OF TENURE IN A RENT CONTROL REGIME

The main effect of rent control on security of tenure outside of emergencies is to move security of tenure from a reasonable protection of the psychological interest of tenants to a major part of a social welfare program. As Mr. Justice Spence pointed out in "Rent Control in Canada": "Rent control cannot overlook tenure control. These two concepts are opposite sides of the same coin. Security of

tenure is absolutely necessary for the enforcement of control of the price; experience has shown that as soon as security of tenure is let go, control of price disappears."[61] In such a situation, security of tenure is coupled with rent control to meet the social welfare objective of the affordable housing.

Security of tenure in a rent control system becomes one of the principal ways of preventing landlords from avoiding rent control and from attempting to undermine affordability of housing. That shift in rationale removes some of the reasonable limitations on security of tenure that balance the psychological interest of tenants and the economic interest of landlords. The effect of rent control, moreover, is considerable. Because rents are actually controlled, there is no need for provisions to prevent discriminatory rent increases. Rent control itself will deal with that issue. However, if one believes that the purpose of rent control is to ensure the social welfare of tenants and the affordability of their housing, it can be argued that tenants who cannot afford to pay their rent should not lose their security of tenure. Security of tenure should protect tenants who cannot afford to pay their rent. Moreover, it can be argued that if affordability is the main purpose, then financial need should determine the duration of security of tenure and that therefore, as long as there is a need among family members sharing the premises, security of tenure should extend to those people as well. It is clear that politically such extensions may

be difficult to make; however, they are consistent with the social welfare rationale for security of tenure and they are both consistent with, and extensions of, the "subsidy" given by landlords to tenants in a rent control regime.[62] Once security of tenure is part of general rent control, its limits are difficult to maintain.

In addition to this possible major expansion of security of tenure that can be justified by rent control, there is a need for security of tenure provisions to prevent landlords from circumventing rent control through demolition and conversion. As has been mentioned, the Condominium Act and the Planning Act in Ontario enable municipalities to control conversions from rental units to condominiums. Such provision can be justified in a security of tenure regime where the goal is to protect the psychological interest of tenants. It is necessary under rent control because rent controls can be easily avoided by converting rental units to ownership units. Similarly, demolition control is necessary to prevent controlled units from being demolished and reconstructed as uncontrolled units. Although no such general demolition power now exists, both controls are necessary to prevent a movement to higher-cost housing. Indeed, this has been a serious political problem in the City of Toronto. The City has pointed out that rent controls, by holding down real rents, have depressed the income values of sites occupied by rental buildings compared to the value they would have if converted to other uses. The widening value gap causes sites occupied by rental

review of these matters from the point of view of the landlord and tenant relationship. This is an area of the law with which municipalities have traditionally not dealt and in which they have no particular expertise. Moreover, it makes sense to have all matters, including conversions and demolitions, dealt with by one body. In either case, conversions and demolition should be allowed only when the vacancy rate for controlled units has reached a certain level so as to ensure that tenants will be able to find a unit similar in quality and price to the controlled unit that has been lost or when the tenant actually has available to him or her a unit of similar price and quality.[65]

In summary, it can be seen that rent control as a social welfare measure leads to the need to extend security of tenure. Hence, a rent control regime should not allow conversions or demolitions as of right or upon the payment of a fee and should ensure protection for tenants even when they fail to pay the rent and should provide for a very extended term, based on need. This discussion does not advocate such a security of tenure regime; rather it describes what is consistent with a rent control regime. It seems fair to conclude that such wide provisions would not, in our society, be viewed as reasonable provisions in contractual relationships and that they are clearly unnecessary in order to provide tenants with security of tenure similar to that of home-owners. These wider provisions only become necessary to the extent that society

buildings to be increasingly regarded as development sites, since their value based on their current income is falling behind their value as cleared land. To prevent the demolition and redevelopment of such sites and thus the avoidance of rent control, demolition control must be provided. The same is true of conversion to condominiums.[63] It is for these reasons that the City of Toronto requested special legislation to control demolition, and the Province of Ontario has passed legislation that grants the City the authority to delay demolitions for up to one year.[64] If rent control as a social welfare measure is the basis of security of tenure, then demolition and conversion must be controlled to prevent landlords from circumventing rent control. This can be done by a number of means. One possibility, given the traditional patterns of land use regulation in Ontario, is through municipal control with appeals to the Ontario Municipal Board. This is now done with respect to condominiums (see s. 50 of the Condominium Act). The other possibility is to grant authority over conversions and demolitions to whatever body is established to deal with security of tenure. This would in fact be more sensible than using municipalities to control these matters, because conversion and demolition control in this setting relate to security of tenure, not planning. There is already municipal authority under the Condominium Act to deal with the construction of condominiums and under the Planning Act to deal with conversion and demolition from the point of view of land use planning. What is required is a

wishes to protect affordability through rent control and ensure that rent control is not circumvented.

LEGAL PROCESS FOR ENFORCING SECURITY OF TENURE

There are two methods of enforcing security of tenure provisions; both entail the use of a legal body. One is to use the County Court as is done now to protect security of tenure; the other is to establish a tribunal to perform this function. The method of ensuring security of tenure assumed in this paper is the provision of legal rights through legislation. The task of a legal body, therefore, would be to interpret the rights of the landlords and tenants and to come to a conclusion regarding them except, perhaps, in the case of demolitions and conversions. The choice of legal institution does not raise many new or substantive issues. A court would be a more formal, less specialized, and perhaps more expensive method of dealing with a dispute. An administrative tribunal, not bound by strict rules of evidence, would be a less formal, less expensive, more specialized, and more flexible method of dealing with the issues.[66] Moreover, a mechanism for arbitrating or conciliating disputes regarding security of tenure could be built into the procedures of a tribunal, although it could also be part of a pre-court process with an appeal to the courts. On the whole it can be argued that a specialized and administrative tribunal is preferable.

The main difficulty with the use of an administrative tribunal is a decision of the Supreme Court of Canada in Reference re Residential Tenancies Board Act.[67] The court held in that case that landlord and tenant disputes relating to the terms of a lease and security of tenure were matters that had historically been dealt with in Ontario by superior courts, which are appointed federally and, therefore, could not be handled by provincially appointed administrative tribunals. Although a recent decision of the Supreme Court of Canada upheld Quebec legislation establishing a provincial rental tribunal, that decision was based on the history of lower courts in Quebec dealing with such matters.[68] It would appear, therefore, that any dispute concerning security of tenure, aside from demolition or conversion matters, which relate to land use planning as well as security of tenure, will have to be finally resolved by at least the County Court. That does not, however, preclude the establishment of an arbitration process. Most important, regardless of the forum chosen to settle disputes, there must be provision for a reasonable means of achieving a remedy in those cases where the limits of security of tenure have been breached. Both landlords and tenants must have a speedy means of presenting their dispute. The landlord must be able to obtain possession quickly where the tenant has breached the provisions of the lease or else landlords will bear an inordinate burden. Similarly, if tenants are unable to secure quick and cheap redress regarding matters such as discriminatory rent

increases, any security of tenure provisions will be meaningless. In a security of tenure regime without rent control, needless delays that inhibit the landlord's ability to regain possession because of the financial difficulties of the tenant impose a cost on the landlord in the same way that rent controls do. There is a need, therefore, for a quick conciliation or arbitration process, speedy appeals, low costs, and the right to counsel for any system of security of tenure to function properly.[69]

CONCLUSION

We have seen that there are two basic rationales for guaranteeing tenants security of tenure. One is to protect tenants' psychological interests and to give them security akin to that enjoyed by home-owners while at the same time recognizing the interests of landlords. The second is to prevent landlords from evading rent control. In this latter case, security of tenure is bound up with housing affordability and general social welfare objectives. No matter which purpose is being served, rent regulation and security of tenure cannot be separated. If psychological protection is to be provided, a limited form of rent control is necessary; if affordable housing is the main goal, then rent control is necessary along with security of tenure.

Although both rationales for the provision of security of tenure are similar, there are differences. With the first rationale, security of tenure involves enabling the

tenant to remain in occupation as long as he or she pays the rent and protecting the tenant from "discriminatory" rent increases that could result in economic eviction. With the second rationale, there is no need to make provision for discriminatory rent increases since the rent is controlled. Under both rationales landlords must be able to regain the premises for their personal use, and under both there should be provision for members of the tenant's immediate family to continue in occupation. Under the rent control rationale, however, it can be argued that because the main purpose of security of tenure and rent control is to ensure that there is a supply of affordable housing, there is substantially less reason to protect the interests of the landlord. Under that rationale, therefore, security of tenure could be extended by removing the requirement to pay rent and by allowing a tenant to assign his or her tenure to family members as long as there was a need. These can be seen as logical extensions of the social welfare goal.

Finally, there is a need to deal with demolitions and conversions to other uses. In a security of tenure regime designed to protect the psychological rather than the economic interests of the tenant, it is less necessary to prevent demolition and conversion as long as the tenant can find a suitable alternative, regardless of the price, and the landlord pays the cost of moving. In the case of security of tenure in a rent control regime, however, demolitions and conversions must be controlled because they may be used to circumvent rent control and increase the cost

of housing. It is clear from this analysis that security of tenure that places a tenant in a position similar to that of a home-owner is a reasonable way to balance the interests of tenants and landlords. It reflects the development of the law of landlord and tenant from a feudal to a contract concept and corresponds to reasonable expectations but does not shift substantial costs to landlords. It is also clear that security of tenure is necessary in a rent control regime. It leads to wider control and makes the setting of limits on security of tenure more difficult. However, both types of security of tenure are possible, and a legal structure and rules can reflect either. The use of the courts as the enforcing agency is probably required for either because of the decision by the Supreme Court of Canada.

NOTES

1. R.S.O. 1980, c. 232.

2. See M. Gorsky, "An Examination of Some of the Recent Amendments to the Ontario Landlord and Tenant Act" (1976-77), 3 Dalhousie L.J. 663.

3. See R.E. Megarty and H.W.R. Wade, The Law of Real Property, 6th ed. (London: Stevens and Sons, 1982), at pp. 359 and 366.

4. Ibid., at pp. 359-370.

5. S. 96 provides that a landlord is responsible for maintenance of the property in accordance with all standards required by law, and subsec. (3) provides for enforcement of this obligation by summary application to the County or District Court.

6. For a different view see D. Nelken, The Limits of the Legal Process: A Study of Landlords' Law and Crime (London: Academic Press, 1983).

7. It has been argued that these provisions are inconsistent with s. 107(1)(c) which allows the landlord to obtain possession to make extensive repairs. If the repairs are so extensive as to require possession by the landlord, s. 121(3) should not stand in the way. Perhaps the Act could be amended to deal with this inconsistency.

8. See B. J. Reiter, "Contracts, Torts, Relations and Reliance" in Studies in Contract Law, eds. Barry Reiter and John Swan (Toronto: Butterworths, 1980).

9. Ibid., at p. 245.

10. L. Fuller, The Morality of Law, rev. ed. (New Haven: Yale University Press, 1969).

11. A. Weinrib, "The Ontario Landlord and Tenant Amendment Act" (1971), 21 UTLJ 93.

12. Ontario, Ministry of Municipal Affairs and Housing, The Impact of Rent Review on Rental Housing in Ontario: A Staff Research Report (Toronto: Ministry of Municipal Affairs and Housing, 1982), at p. 142.

13. Part I of the Constitution Act, 1982, enacted as Schedule B to the Canada Act, 1982, c. 11 (U.K.), which was proclaimed in force on April 17, 1982.

14. 314 N.E.2d. 118 at 123ff. (Mass. S. Ct. 1974).

15. See G. Tullock and J. Buchanan, The Calculus of Consent, Logical Foundations of Constitutional Democracy (Ann Arbor: University of Michigan Press, 1962); and J. Buchanan and R. Tollison, Theory of Public Choice: Political Application of Economics (Ann Arbor: University of Michigan Press, 1972).

16. See M. A. Glendon, The New Family and the New Property (Toronto: Butterworths, 1981); and C. A. Reich, "The New Property" (1964), 73 Yale L.J. 753.

17. Glendon, op.cit., note 16, chapter 5.

18. S. Cheung, "A Theory of Price Control" (1974), 17 Journal of Law and Economics 53.

19. Ss. 34 to 38 of the Planning Act, 1983, S.O. 1983, c. 1, contain zoning and related controls on land use in Ontario, while ss. 41 to 42 authorize more specific development controls on particular projects. Part III sets out procedures for preparing and amending official plans, which establish policies for the application of specific controls such as community improvement schemes (Part III) and subdivision control (Part VI). S. 33 deals with demolitions. Condominium conversion is controlled both by the general planning powers in the Planning Act 1983, and by the Condominium Act, R.S.O. 1980, c. 84.

20. T. Honoré. The Quest for Security: Employees, Tenants, Wives (London: Stevens and Sons, 1982), at pp. 35-37.

21. Ibid., at p. 35.

22. Ibid., at pp.35-36.

23. Ibid., at pp.36-37.

24. Such as those paid under the Housing Development Act, R.S.O. 1980, c. 209.

25. See Glendon and Reich, op.cit., note 16.

26. See R. J. Arnott, Rent Controls and Options for Decontrol in Ontario (Toronto: Ontario Economic Council, 1980).

27. Gorsky, op.cit., note 2, at p. 704.

28. See Ontario Law Reform Commission, Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies (Toronto: Ontario Department of the Attorney General, 1968); and Wishart F. Spence, "Rental Control in Canada" in Refresher Course Lectures, arranged by the Law Society of Upper Canada for its members of the

Armed Forces, Vol. 1 (Toronto: Richard de Boo, 1945), at p. 295.

29. A.H. Oosterhoff and W. B. Rayner, Losing Ground: The Erosion of Property Rights in Ontario (Toronto: Ontario Real Estate Association Foundation, 1979).

30. Municipal Act, R.S.O. 1980, c. 302, s. 369.

31. See S. M. Makuch, "Plain Language and the Law of Mortgages" unpublished study for the Law of Mortgages Project, Toronto, Law Reform Commission of Ontario, 1983.

32. Interest Act, R.S.C. 1970, c. I-18, s. 10. See also the Mortgages Act, R.S.O. 1980, c. 296, s. 17.

33. Home et. al. v. London Life Insurance Co. (1981), 32 O.R. (2d) 619 (H.C.), illustrates the way in which these sections are applied.

34. S. 106(1) provides that "upon the expiration of a tenancy agreement for a fixed term, the landlord and the tenant shall be deemed to have renewed the tenancy agreement as a monthly tenancy agreement upon the same terms and conditions as are provided for in the expired tenancy agreement." See also the Landlord and Tenant Act, R.S.A. 1980, c. L-6, s. 12; the Residential Tenancy Act, R.S.B.C. 1979, c. 365, s. 22; The Residential Tenancies Act, S.N.B. 1975, c. R-10.2, s. 23 as am.; Code Civil de Québec, Article 1658, as enacted by An Act to Establish the Régie du logement and to amend the Civil Code and other legislation, S.Q. 1979, c. 48, s. 111; The Landlord and Tenant Act, R.S.M. 1970, c. L-70, s. 103(8)(b) provides for deemed renewal of the tenancy agreement for a further six-month period.

35. S. 108 provides that "where a tenant fails to pay rent in accordance with a tenancy agreement, the landlord may serve on the tenant notice of termination of the tenancy agreement to be effective not earlier than the twentieth day after the notice is given." See also the Residential Tenancy Act (B.C.), op.cit., note 34, s. 20; The Landlord and Tenant Act (Man.), op.cit., note 34, s. 104; The Residential Tenancies Act (N.B.), op.cit., note 34, s. 19 as am.; The Landlord and Tenant (Residential Tenancies) Act 1973, S.N. 1973, No. 54, s. 15(6); the Residential Tenancies Act. S.N.S. 1970, c. 13, s. 7(3) and (3A); the Landlord and Tenant Act, R.S.P.E.I. 1974, c. L-7, s. 108(3)(b); Code Civil de Québec, Article 1656.4 as am.; The Residential Tenancies Act, R.S.S. 1978, c. R-22, s. 27(1)(c).

36. S. 109(1) provides that:

> 109.-(1) Notwithstanding section 100, 101, 102, 103, 104 or 105, where,
>
> (a) a tenant causes or permits undue damage to the rented premises or its environs and whether by his own wilful or negligent acts or by those of any person whom the tenant permits on the residential premises;
>
> (b) a tenant at any time during the term of the tenancy exercises or carries on, or permits to be exercised or carried on, in or upon the residential premises or any part thereof, any illegal act, trade, business, occupation or calling;
>
> (c) the conduct of the tenant or a person permitted in the residential premises by him is such that it substantially interferes with the reasonable enjoyment of the premises for all usual purposes by the landlord or the other tenants;
>
> (d) the safety of other bona fide and lawful right, privilege or interest of any other tenant in the residential premises is or has been seriously impaired by an act or omission of the tenant or a person permitted in the residential premises by him where such act or omission occurs in the residential premises or its environs; or
>
> (e) the number of persons occupying the residential premises on a continuing basis results in the contravention of health or safety standards including any housing standards required by law;
>
> (f) a tenant of residential premises administered for or on behalf of the Government of Canada or Ontario or a municipality or any agency thereof or forming part of a non-profit, limited dividend housing project financed under the National Housing Act (Canada) has knowingly and materially misrepresented his income or that of other members of his family occupying the residential premises,
>
> the landlord may serve on the tenant a notice of termination of the tenancy agreement to be effective not earlier than the twentieth day after the notice is given, specifying the act

or acts complained of, and requiring the tenant, within seven days, to pay to the landlord the reasonable costs of repairing the premises, or to make the repairs to the reasonable satisfaction of the landlord in the case mentioned in clause (a) or to cease and desist from the activities in the cases mentioned in clause (c) or (d) or to reduce the number of persons occupying the premises in the case mentioned in clause (e).

See also the Landlord and Tenant Act (Alta.), op.cit., note 34, ss. 23(1)(h) and 16; the Residential Tenancy Act (B.C.), op.cit., note 34, s. 24; The Landlord and Tenant Act (Man.), op.cit., note 34, s.98; The Residential Tenancies Act (N.B.), op.cit., note 34, ss. 4 and 5; The Landlord and Tenant (Residential Tenancies) Act 1973 (N.S.), op.cit., note 35, ss. 7 and 11; the Residential Tenancies Act (N.S.), op.cit., note 35, ss. 6 and 10; the Landlord and Tenant Act (P.E.I.), op.cit., note 35, s. 116; Civil Code de Québec, Articles 1651 to 1657.5; The Residential Tenancies Act (Sask.), op.cit., note 35, ss. 20 and 27.

37. There is currently no provision in Ontario that addresses this problem.

38. The British Columbia Law Reform Commission, in its Report on Landlord and Tenant Relationships (Vancouver: Department of the Attorney General, 1973), recommended the onus be placed on the tenant.

39. See Honoré, op.cit., note 20, at p. 55, citing the Rent Act, 1977, Sch. 1, Pt. 1.

40. See J. R. Miron and J. B. Cullingworth, Rent Control: Impacts on Income Distribution, Affordability and Security of Tenure (Toronto: Centre for Urban and Community Studies, University of Toronto, 1983), at p. 61.

41. (1982), 36 O.R. (2d) 175.

42. S. 91(3) provides that "a tenancy agreement may provide that the right of a tenant to assign, sublet or otherwise part with possession of the rented premises is subject to the consent of the landlord and, where it is so provided, such consent shall not be arbitrarily or unreasonably withheld."

43. It should be noted that the statutory provisions to be discussed apply only where the lease does not provide the tenant with a longer period of notice or greater

degree of protection. Where the parties have bargained for greater tenant protection, there is no reason to apply the lesser protection of the Act.

44. See note 36 for the present legislation in Ontario and comparable provisions in some other jurisdictions.

45. The Residential Tenancies Act, R.S.O. 1980, c. 452, s. 38 (never proclaimed) contained a mechanism whereby the tenant could initiate proceedings.

46. S. 84(1) provides that:

> 84.-(1) A landlord shall not require or receive a security deposit from a tenant under a tenancy agreement entered into or reviewed on or after the 1st day of January, 1970 other than the rent for a rent period not exceeding one month, which payment shall be applied in payment of the rent for the last rent period immediately preceding the termination of the tenancy.

See also the Landlord and Tenant Act (Alta.), op.cit., note 34, ss. 37 to 39; the Residential Tenancy Act (B.C.), op.cit., note 34, ss. 31 to 35; The Landlord and Tenant Act (Man.), op.cit,, note 34, s. 84; The Residential Tenancies Act (N.B.), op.cit., note 34 s. 8; The Landlord and Tenant (Residential Tenancies) Act 1973 (Nfld.), op.cit., note 35, s. 18; the Residential Tenancies Act (N.S.), op.cit., note 35, s. 9; the Landlord and Tenant Act (P.E.I.), op.cit., note 35, s. 96; Code Civil de Québec, Article 1665.2; The Residential Tenancies Act (Sask.), op.cit., note 35, s. 30 to 37.

47. S. 93 provides that:

> 93. Except in cases of emergency and except where the landlord has a right to show the premises to prospective tenants at reasonable hours after notice of termination of the tenancy has been given, the landlord shall not exercise a right to enter the rented premises unless he has first given written notice to the tenant at least twenty-four hours before the time of entry, and the time of entry shall be during daylight hours and specified in the notice, except that nothing in this section shall be construed to prohibit entry with the consent of the tenant given at the time of entry.

See also the Landlord and Tenant Act (Alta.), op.cit., note 34, s. 17; the Residential Tenancy Act (B.C.), op.cit., note 34, s. 28; The

Landlord and Tenant Act (Man.), op.cit., note 34, s. 95; The Residential Tenancies Act (N.B.), op.cit., note 35, s. 16. The Landlord and Tenant (Residential Tenancies) Act 1973 (Nfld.), op.cit., note 35, s. 7(1); the Residential Tenancies Act (N.S.), op.cit., note 35, s. 6(1); the Landlord and Tenant Act (P.E.I.), op.cit., note 35, s. 103; Code Civil de Québec, Articles 1622, 1653.5; 1654 to 1654.3; The Residential Tenancies Act (Sask.), op.cit., note 35, s. 20(1).

48. British Columbia Law Reform Commission, op.cit., note 38, at pp. 66-67.

49. See the Residential Tenancy Act (B.C.), op.cit., note 34, s. 23(2)(h).

50. See The City of Toronto Act, 1975 (No. 2), S.O. 1975, c. 117, s. 4.

51. Noble and Wolf v. Alley, [1951] S.C.R. 64; [1951] 1 D.L.R. 321.

52. S. 105 of the Landlord and Tenant Act provides that:

> 105. Notwithstanding section 100, 101, 102, 103 or 104, where a landlord bona fide requires possession of residential premises at the end of,
>
> (a) the period of the tenancy; or
> (b) the term of a tenancy for a fixed term,
>
> for the purpose of occupation by himself, his spouse or a child or parent of his or his spouse, the period of the notice of termination required to be given is not less than sixty days.

The Act demands that the requirement of possession be a bona fide one, but does not deal with successful fraudulent applications, such as parents or children never occupying the premises after a termination. The Residential Tenancies Act, op.cit., note 45, s. 53, would have required the landlord to pay the tenants' moving expenses and any increase in rent, for up to a twelve-month period, that the tenant was obliged to pay as a result of the improper termination. This provision should be added to s. 105 of the present Act.

53. British Columbia Law Reform Commission, op.cit., note 38, at pp. 66-68.

54. It has been suggested, correctly we think, that a bona fide purchaser from the landlord who wishes to occupy the premises (or have his family do so) should have the

same power to obtain possession as a landlord. Section 105 of the Act should be amended to allow bona fide purchasers under enforceable agreements of purchase and sale to give the sixty-day notice. See also s. 51(1)(b) of the Residential Tenancies Act, op.cit., note 45.

55. See for example the Landlord and Tenant Act, R.S.O. 1980, c. 232, s. 107; the Residential Tenancy Act (B.C.), op.cit., note 34, s. 17; The Landlord and Tenant Act (Man.), op.cit., note 34, s. 103(4); Code Civil de Québec, Articles 1660.4 and 1661.1; The Residential Tenancies Act (Sask.), op.cit., note 35, s. 29(2).

56. Current Ontario legislation is noted at note 19. See also the Condominium Property Act, R.S.A. 1980, c. C-22, s. 8; the Condominium Act, R.S.B.C. 1979, c. 61; The Condominium Act, R.S.M. 1970, c. 170; the Condominium Property Act, R.S.N.B. 1973, c. C-16; the Condominium Act, R.S.N. 1970, c. 57; the Condominium Act, S.N.S. 1970-71, c. 12; The Condominium Property Act, R.S.S. 1978, c. C-26, s. 8.

57. See M. A. Glendon, "The Transformation of American Landlord-Tenant Laws." (1982), 23 B.C.L. Rev. 503.

58. British Columbia Law Reform Commission, op.cit., note 38, at pp. 66-68.

59. S. 107(1) provides in part:

> 107.-(1) Notwithstanding section 100, 101, 102, 103, 104 or 105, where a landlord requires possession of residential premises for the purposes of,
>
> (a) demolition;
> (b) conversion to use for a purpose other than rental residential premises; or
> (c) repairs or renovations so extensive as to require a building permit and vacant possession of the premises,
>
> the landlord may, at any time during the currency of the tenancy agreement, give notice of termination of the tenancy agreement.

60. It will have been noticed that there are a variety of notice periods mentioned. Some notices are for sixty days, others are for 120 days. It might be more convenient to have one period (say, ninety days) which covers all these situations.

61. Wishart F. Spence, op.cit., note 28, at p. 295.

62. W. Block and E. Olsen, eds., Rent Control: Myths and Realities (Vancouver, British Columbia: The Fraser Institute, 1981).

63. See City of Toronto, Planning and Development Department, "Report to: Committee on Neighbourhoods, Housing, Fire and Legislation. Subject: Impact of Development Trends on Rental Apartment Districts," P & R/Policy 333/00204, September 12, 1980.

64. City of Toronto Act, 1984, S.O. 1984, c. Pr6. [Bill Pr003, An Act respecting the City of Toronto].

65. City of Toronto, Clause 1, Report no. 17, of the Committee on Urban Renewal, Housing, Fire and Legislation, adopted by City Council, October 17, 1974, for example, provides that conversions from rental to condominiums should not occur unless the Metropolitan Toronto vacancy rate is above 2.5 per cent.

66. The applicable rules of procedure are set out in the Statutory Powers Procedure Act, R.S.O. 1980, c. 484, although these may be adopted in varying ways by different tribunals.

67. (1981), 123 D.L.R. (3d) 554 (S.C.C.).

68. A-G Quebec v. Groudin et. al. (1983), 50 N.R. 50 (S.C.C.).

69. See Gorsky, op.cit., note 2, at pp. 683-697.